Board of Alien Labor Certification Appeals

UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

'Notice: This is an electronic bench opinion which has not been verified as official'

DATE: August 14, 1997

CASE NO: 95 INA 297

In the Matter of:

FRANK AGOSTA,
Employer,

On Behalf of:

KRYSTYNA DABROWSKA,
Alien

Appearance: P. W. Janaszek, New York, New York

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Krystyna Dabrowska (Alien) by Frank Agosta (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

STATEMENT OF THE CASE

On March 16, 1994, the Employer applied for labor certification to permit him to employ the Alien on a permanent basis as a "Cook Kosher" to perform the following duties in his household:

> Prepares, seasons, and cooks soups, meats, vegetables, etc. according to the principles of Kosher cuisine. Bakes, broils, and steam meat, fish and other food. Prepares Kosher meats such as Kreplach, Stuffed Cabbage, Matzo Balls. Decorates dishes according to the nature of celebration. Purchases foodstuff and accounts for the expenses incurred.

The work week was forty hours from 9:00 AM to 6:00 PM at the rate of $12.48 per hour with no overtime. The position was later classified as "Cook (Household)(Live-Out), under DOT Code No. 305.281-010. The application (ETA 750A) indicated as education requirements the completion of elementary and high school studies and further required that applicants have two years of experience in the Job Offered. The Alien met both the educational and experience qualifications as she was a high school graduate and had worked from February 1990 to March 1994 as a "Cook, kosher" in a residence in Brooklyn, N. Y. AF 02-05.[2] In an addendum to the application, the Employer stated that, "I am a senior citizen and I need a special, well balanced diet with low sugar, low cholesterol, and low fact contents. I can not purchase the foodstuffs and prepare meals myself because of my health condition. I have had a knee operation and my movement is severely limited." AF 01.[3]

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[2]The duties performed in this position were virtually identical to those listed in the Employer's portion of this application. The employment continued until this application was filed.

[3]Based on these representations it is inferred that the cooking would be performed for the Employer, only, as he is the sole member of his household. The referral by the State agency noted that no responses to the advertisement and

Although the job was duly advertised, no response was received. The State employment office commented that, "This does not logically appear to be a 'full-time' job offer solely for cook (household)?" AF 27.

Notice of Findings. On September 6, 1994, a Notice of Findings (NOF) by the CO advised that certification would be denied unless the Employer corrected the defects noted. The CO said Employer's application failed to establish that the position at issue was permanent full time employment in this two person household within the meaning of the Act and regulations after considering the application.[4] The CO required that this finding be rebutted with evidence that the job constitutes full-time employment as defined in the Act and regulations and that it was customarily required by the Employer. The CO then listed the evidence required for the Employer to prove that the job offered is a full time position. The data required was stated in the form of requests for specific facts and for responses to explicit questions, all of which were designed to draw out collateral information that addressed this issue, and included inter alia the direction that the Employer produce evidence that he customarily employed full time kosher cooks in the past. AF 29-30. The CO then stated

> We note that over 90 percent, if not all, of the Applications for Alien Employment Certification for the occupation of Household Cook received with agent Eastern European Council, involve a kosher food preparation experience requirement and almost all identically state that presently "all cooking duties are performed by my relative who no longer can do this because of personal reasons". Employer is required to provide evidence and documentation to support the kosher food experience requirement and to support that a relative is currently performing these duties. Additionally, as employer states that "cleaning is done by an hourly worker", please provide evidence and documentation to support, i.e., contracts, bills, receipts, etc.

AF 29.

Rebuttal. On October 6, 1994, the Employer filed a rebuttal in which he described his need for the services of a cook to shop for food and prepare meals. The Employer then added that, "For

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posting of the job were received.

[4]The CO cited 20 CFR § 656.50, but there is no such regulation. It is assumed that the CO meant to refer to the definitions for this part at 20 CFR § 656.3, which contain the following: "Employment means permanent full time work by an employee for an employer other than oneself. For purposes of this definition an investor is not an employee."

religious considerations I seek a Kosher Cook." He then offered a detailed schedule of the time the cook would be expected to spend each day in preparation of meals. shopping for fresh ingredients, cleaning up the kitchen, and accounting for daily expenditures. As the cooking services had been provided for him by family members and his cleaning services had been provided "by the religious denomination" and no expenditure had been incurred, the Employer had no history of previous hiring and payment for such household services as he had enjoyed in the past. Employer then alluded to the CO's reference to the many applications that Eastern European Council had filed, and for this reason he challenged the objectivity of the NOF finding.[5] AF 32-35.

Final Determination. On October 13, 1994, the CO denied certification on grounds that the Employer failed to prove that the position was full time employment in the Employer's household and has been customarily required in his household, finding that the rebuttal failed to establish that the job constitutes full time employment or that the position is "a customary requirement."[6] After reviewing the contents of the NOF, the CO said the finding that Employer had failed to prove that the job was full time was based on Employer's failure to document the need of for a full time Kosher cook, "paid or otherwise," having failed to document the medical necessity for such service in his household. Second, the CO found Employer's representations as to the cook's daily schedule to be "unrealistic," pointedly emphasizing that the time allotted each day was "**for one person.**" (Emphasis as in original.) Finally, the CO noted that the Employer's letter of March 1, 1994, was contradicted by his rebuttal. He first had alleged that the household cleaning was done weekly by an hourly worker, but in his rebuttal had stated that the housework now was being done for him "free of charge." In conclusion, however, the CO simply found that the Employer had failed to demonstrate that this job constitutes full time employment, adding gratuitously,

> It would appear rather, that an effort is being made to qualify the alien under the "Skilled Worker" category because of the unavailability of visa numbers in the "Other Worker" category of employment based preferences.

AF 37-40. Certification was then denied.

Employer's appeal. In appealing from the CO's denial of certification the Employer took issue with the CO's having found

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[5]Although the CO did not reject or make a negative finding as to the reference to Kosher food in the NOF, the Employer assumed that this was rejected as a restrictive requirement and his response in the rebuttal is noted.

[6]The CO again cited 20 CFR § 656.50, which was noted supra as incorrect.

"unrealistic" the schedule of the time required to perform the job duties at issue. The Employer disputed the CO's apparent use of a criterion that entertainment was an essential ingredient for certification under DOT Code No. 305.281-010. Employer then remonstrated that the conclusion stated in the CO's FD was based on criteria that were inconsistent with the regulations in that the CO asserted that his application was an effort "to qualify the alien under the 'Skilled Worker' category because of the unavailability of visa numbers in the 'Other Worker' category of employment based preferences." AF 45-48.

DISCUSSION

The CO decided this application primarily on the evaluation of the Employer's responses to the NOF as to whether or not the job was a permanent full time position of employment. After comparing the Employer's rebuttal and his argument appealing from the denial of certification, it appears that the Employer did assert time estimates that, if credible, could establish that the duties of this household cook are sufficiently substantial to occupy an eight hour day of work in the Employer's kitchen. In this case the CO appears skeptical that the facts underlying the time schedule are consistent with reality.

First, as the requirement of a worker able to conduct the kitchen and prepare meals in accordance with the religious laws pertaining to Kashruth was not challenged as restrictive by the CO, this application was determined by the CO as pertaining to a household cook, only.

Second, the CO determined this request for certification by considering whether or not the Employer has shown the existence of a full time permanent position. The Employer did not offer any evidence other than his age and his own opinion as to his infirmity to prove his need, while the CO clearly expected him to furnish at least a physician's statement that the Employer was disabled to the extent he asserted. It is the general rule that an employer's representations are considered documentation for the purposes of the Act and regulations, where the statements are reasonably specific and identify their bases. The CO must consider such documentation and give it the weight it rationally deserves. **Gencorp**, 87 INA 659(Jan. 13, 1988), as cited in **Central Michign Community Hospital**, 89 INA 116(Jan. 31, 1990). In this case the CO appeared aware that this household is in reality only a single person, and the CO questioned assumptions underlying any inference that a full time job exists under all of the circumstances this Employer suggested.

This case is distinguished from an application in which the CO questioned the "business necessity" of the job. No such issue was raised in either the NOF or the FD, as it is clear that the Employer was not required to prove the business necessity for the

position offer, itself, if a bona fide job does exist in fact. **Abedlghani and Houda Abadi**, 90 INA 139 (June 4, 1991).[7]

This NOF initially indicated that certification would be weighed on Employer's proof that a permanent full time position existed. The CO's closing remarks, which the Employer's appeal cited and quoted, strongly suggest that the evidence of record was weighed under criteria that were neither stated nor justified by either the regulations or the record of this proceeding, based on the CO's construction of the Act and regulations. As a result of the CO's gratuitous remarks in the NOF and FD concerning the Eastern European Council's representations in behalf of other applicants for certification, the Employer reasonably assumed that his application was not considered impartially and that the identity of his representative had improperly influenced the result. As the challenged statements of the CO clearly appear in the NOF and FD together with findings as to the existence of the position at issue, it is impossible to determine from this record whether the CO's conclusion was based entirely on the evidence in the appeal file. For these reasons the issue of certification appears incorrectly decided on the evidence of record, and the file should be remanded for reconsideration by the CO for these reasons.

ORDER

The Final Determination denying certification under the Act and regulations is hereby set aside and this file is remanded to for reconsideration by the Certifying Officer.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

[7]Also see **Hubert Peabody,** 90 INA 230 (Apr 30, 1991); **Joon Sup Park,** 89 INA 231 (Mar. 25, 1991); **Shinn Shyng Chang,** 88 INA 028 (Sept. 21, 1989); **Timmy Wu,** 87 INA 735 (June 28, 1988); **Teresita Tecson**, 94 INA 014(May 30, 1995).

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

CASE NO: 95-INA-297

FRANK AGOSTA, Employer,
KRYSTYNA DABROWSKA, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: May 9, 1997